## UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

# VERITAS HEALTH SERVICES, INC. d/b/a CHINO VALLEY MEDICAL CENTER Employer

and

Case No. 31-RC-8795

UNITED NURSES ASSOCIATIONS OF CALIFORNIA/UNION OF HEALTH CARE PROFESSIONS, NUHHCE, AFSCME, AFL-CIO Petitioner

Theodore R. Scott and Brady J. Mitchell, Attys., (Littler Mendelson, P.C.), San Diego, CA, for the Employer.
Lisa C. Dernidovich, Atty., (UNAC/UHCP), San Dimas, CA, for the Petitioner.

### ADMINISTRATIVE LAW JUDGE REPORT AND RECOMMENDATIONS ON OBJECTIONS

Statement of the Case

LANA PARKE, Administrative Law Judge. On February 22, 2010,¹ United Nurses Associations of California/Union of Health Care Professions, NUHHCE, AFSCME, AFL-CIO (the Petitioner or the Union) filed a petition for election (the Petition) among the per diem registered nurses employed by Veritas Health Services, Inc. d/b/a Chino Valley Medical Center (the Employer or the Hospital) with the Regional Director of Region 31 of the National Labor Relations Board (the Board).² Thereafter, pursuant to a Stipulated Election Agreement, an election was conducted under the direction and supervision of the Regional Director on April 1 and 2, 2010 in the following unit:

All full-time, regular part-time and regular per diem registered nurses employed by the Employer at its 5451 Walnut Avenue, Chino, California facility in the following departments: Emergency Services, Critical Care Services/Intensive Care Unit, Surgery, Post-Anesthesia Care Unit, Outpatient Services, Gastrointestinal Laboratory, Cardiovascular Catheterization Laboratory, Radiology, Telemetry/Direct Observation Unit and Medical/Surgical.

<sup>&</sup>lt;sup>1</sup> All dates are in 2010 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> In May 2008, the Board conducted an election in Case 31-RC-8689 in the same unit involving the same parties, which the Petitioner lost (the 2008 election). The Petitioner's post-election objections to the conduct of the election were, in part, found meritorious by Report and Recommendation on Objections issued January 16, 2009. While the matter was still pending before the Board on exceptions, the Petitioner on February 2 withdrew its objections, and certification of the results of the election issued on February 18.

The Region served a tally of ballots upon the parties following the election, which showed that of approximately 125 eligible voters, 116 cast ballots, of which 72 were cast for the Petitioner and 39 were cast against the Petitioner. Four challenged ballots were insufficient to affect the results of the election.

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On April 9, the Employer filed timely objections to conduct affecting the results of the election. On May 3, the Regional Director issued a Report on Objections, Order Directing Hearing, and Notice of Hearing setting the Petitioner's objections 1 through 29 for hearing. A hearing was conducted in Los Angeles, California, May 25 through May 27 and June 7, on the Employer's objections. In its post-hearing brief, the Employer withdrew Objections 17-19, relating to the posting of pro-union literature by supervisory charge nurses, and Objections 22-25, relating to vandalism and violence.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Employer and the Petitioner, I make the following<sup>3</sup>

#### II. Findings of Fact

#### A. The Organizational and Election Campaign

During the weeks prior to February 22, when the Petitioner filed the Petition, unit employees as well as charge/relief charge nurses engaged in prounion activities, as detailed hereafter. The Petitioner obtained signed representation authorization cards (authorization cards or cards) from the Employer's nursing employees in the above-described unit (unit employees). Among the card signers were the following charge/relief charge nurses who signed on the dates indicated:

	Leslie Terrazas -1/25	Angelica Silva -1/27	Laurel Smith -1/28
30	Dulce Suzon -1/25	Rhoda De Leon -1/27	Liezle Castro -1/29
	Bienvenido Trinidad -1/25	Cheryl Gilliatt - 1/27	Samantha Jones -1/30
	Ann Johnson -1/26	John Del Valle -1/28	

As in the 2008 election, the supervisory status of certain charge/relief charge nurses was in issue. Initially the Union and a number of charge/relief charge nurses took the position the charge/relief charge nurses were not supervisors.<sup>4</sup> On March 5, the parties entered into a Stipulation Regarding Supervisory Status and Voter Ineligibility (2010 Supervisory Status Stipulation), agreeing that 22 individuals were employed as charge nurses at the Hospital during the eligibility period and were ineligible to vote, being supervisors within the meaning of Section 2(11) of the Act; all eleven card-signing charge/relief charge nurses listed above were included in the stipulation. Of the following stipulated-supervisory charge/relief charge nurses' names,

<sup>&</sup>lt;sup>3</sup> Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony regarding events occurring during the period of time relevant to these proceedings.

<sup>&</sup>lt;sup>4</sup> Sometime prior to March 5, 11 charge/relief charge nurses signed a petition that was presented to the Employer, entitled WE ARE CHARGE RNs WE ARE NOT MANAGERS, stating, in pertinent part, "We...do not consider ourselves managers and we do not have management level responsibilities, such as the ability to hire or fire. We ask that [the] administration recognize that we are not managers by allowing us to have a voice and a vote in the nurses' process to form a union."

those marked by asterisks had been included in the parties' 2008 Stipulation Regarding Supervisory Status and Voter Ineligibility:

	*Edna Borbon	Lucia Eiley	Ann Johnson	*Dulce Suzon
5	*Roma Carpenter	Joan Encalade	*Samantha Jones	Leslie Terrazas
	*Dolly Casas	*Felipe Florendo	*Christine Lansang	Bienvenido Trinidad
	*Liezle Castro	*Maria Cynthia Gabot	*Ofelia Margolis	*Maryann Yan
	*Mariana Catiesanu	Cheryl Gilliatt	Karianne Salazar	
	*Rhoda De Leon	Teresa Hower	Angelica Silva	
10	*John Del Valle	*Xiuying Huang	Laurel Smith	

After the parties entered into the 2010 Supervisory Status Stipulation, the Employer issued a memorandum to all registered nurses on March 5 that set forth the dates, time, and place of the upcoming election and stated, in pertinent part:

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Eligible to vote in this election will be all full-time, part-time and per diem RNs regularly employed by [the Employer] as of the payroll period ending February 20, 2010. [The Petitioner] agrees that our Charge Nurses and seven of our relief Charge Nurses are supervisors and, therefore, excluded from the bargaining unit and ineligible to vote.

Eligible RNs will vote on whether or not they want to be represented by the union. The election is conducted by the NLRB, a neutral U.S. Government agency, not by [the Petitioner] or the Hospital. Because the election is by secret ballot, no one will know how you vote unless you tell them. You are free to vote against the union even if you signed a union card or previously pledged support for the union or are a union member elsewhere.<sup>5</sup>

The Employer also held a meeting of all stipulated-supervisory charge/relief charge nurses, informing them they were supervisors within the meaning of the Act and would be ineligible to vote in the upcoming election. No evidence was adduced that thereafter any stipulated-supervisory charge/relief charge nurse encouraged any unit employee to support the Union.

During the week of the election, both the Petitioner and the Employer provided campaign literature to unit employees. The Petitioner distributed a brochure with photographs of about 50 unit employees holding large white placards at torso level that read: "I'M VOTING YES!" (the photo Vote-Yes brochure). The Employer distributed undated individually addressed letters personally signed by seven managerial employees, including Dr. Lally, the Employer's Chief Medical Officer, and former relief charge nurses Cheryl Gilliatt and Angelica Silva (the Vote-No letter). The Vote-No letter read in pertinent part:

Thursday, April 1 and Friday April 2, 2010 are very important dates for you, your family and the hospital. It's very important that you vote and please remember your vote is secret.

<sup>&</sup>lt;sup>5</sup> The Employer also showed the memorandum to employees in slide form at a mandatory employee meeting sometime prior to the election.

<sup>&</sup>lt;sup>6</sup> At the time the vote-no letter was distributed to employees both Silva and Gilliatt had been promoted to managerial positions with the Employer.

We've already seen the union's misrepresentation, bullying tactics and the divisiveness that has resulted. In contrast, we have been open and honest with you and provided only factual information to help you make an informed decision.

We the Chino Family enjoy our relationship and hope to maintain a union free environment. Please vote no on Thursday, April 1 and Friday, April 2, 2010.

#### B. The Employer's Objections

1. Objections 1-16, 20-21, and 29

On April 9, the Employer filed 29 timely objections to conduct affecting the results of the election, seven of which were withdrawn post-hearing. Objections 1-16, 20-21, and 29 all relate to the alleged conduct of stipulated supervisors in assisting, supporting, and campaigning for the union and in encouraging employees to do likewise with the Union's knowledge and contrivance. Employer Objections 1-16, 20-21, and 29 overlap extensively; since those objections are based on essentially the same facts and rest on the same legal theories, they are considered together. Objections 1-16, 20-21, and 29, in pertinent part, are as follows:

- 1. [The Union]...enlisted the support of Section 2(11) supervisors to solicit authorization cards from employees.
- 2. Section 2(11) supervisors solicited Union authorization cards from employees.
- 3. The Union... utilized Section 2(11) supervisors to solicit authorization cards from employees.
- 4. The Union...utilized Section 2(11) supervisors to engage in pro-Union electioneering directed at employees.
- 5. Section 2(11) supervisors engaged in pro-Union electioneering directed at employees.
- 6. Employees were advised and were aware that Section 2(11) supervisors were engaged in pro-Union electioneering during the course of the Union's organizing campaign.
- 7. The Union...allowed Section 2(11) supervisors to attend Union meetings during the course of the Union's organizing campaign.
- 8. Section 2(11) supervisors attended Union meetings during the course of the Union's organizing campaign.
- 9. Employees were advised and were aware that Section 2(11) supervisors attended Union meetings during the course of the Union's organizing campaign.
- 10. The Union...allowed Section 2(11) supervisors to sign authorization cards.
- 11. Section 2(11) supervisors signed authorization cards during the course of the Union's organizing campaign.
- 12. The Union...utilized authorization cards signed by Section 2(11) supervisors during the course of the Union's organizing campaign.
- 13. Employees were advised and were aware that Section 2(11) supervisors had signed Union authorization cards during the course of 1he Union's organizing campaign.
- 14. The Union...utilized Section 2(11) supervisors to direct that employees support the Union.
- 15. Section 2(11) supervisors directed that employees support the Union during the course of the Union's organizing campaign.
- 16. Employees were advised and were aware that Section 2(11) supervisors directed that employees support the Union during the course of the Union's organizing campaign.

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20. The Union's organizing drive was initiated and supported by Section 2(11) supervisors.

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- 21. Employees were advised and were aware that the Union's organizing drive was initiated and supported by Section 2(11) supervisors.
- 29. By the conduct referenced above and other conduct, Section 2(11) supervisors engaged in conduct interfering with the election or in conduct affecting the results of the election.

During the 2010 election period, Kyle Serrette (Serrette) was the Union's organizing director with overall responsibility for the organizational campaign among the Employer's unit employees, a position he had also held in the 2008 campaign. Ronald Magsino (Magsino), a unit employee in the Emergency Department (ER), was also active in the union's organizational efforts. During the 2010 period, Serrette knew which employees were charge nurses or relief charge nurses. Prior to March 5, the Union reached out to a broad group of employees including later-stipulated supervisory charge/relief charge Nurses seeking to involve them in organizational activities. In the course of the campaign, the Petitioner held a number of organizational meetings at a local Denny's Restaurant (Denny's) and at a local Hampton Inn, some of which stipulated-supervisory charge/relief charge nurses attended along with nonsupervisory unit employees. In late January the Union devoted a week to authorization-card signing at the Hampton Inn.

Early in the campaign, the Union set up an employee organizational committee. Serrette communicated with committee members about organizational matters. Some union-sympathetic supervisory charge/relief charge nurses' names were on the committee roster until March 5, when the parties entered into the 2010 Supervisory Status Stipulation. After the parties' reached stipulation, the Employer notified the stipulated-supervisory charge/relief charge nurses they were ineligible to vote. Thereafter the Petitioner dropped the ineligible charge/relief charge nurses from its organizational committee roster, and there is no evidence any stipulated-supervisory charge/relief charge nurse subsequently voiced support for or otherwise promoted the Union to nonsupervisory unit employees.<sup>7</sup> Throughout the election period, the Employer opposed unionization and distributed multiple flyers to unit employees with "Vote No" messages, including the Vote-No letter described above.

<sup>&</sup>lt;sup>7</sup> At the hearing, the Employer sought to adduce evidence as to communications between supervisory charge/relief charge nurses and union representatives, arguing that such evidence would establish that the Union specifically targeted and relied on the efforts of Section 2(11) supervisors in support of the Union's organizing efforts, which the Employer contended was objectionable conduct in itself. I declined to receive evidence of interactions solely between union representatives and supervisory charge/relief charge nurses since such interactions, unknown to eligible voters, could not reasonably tend to interfere with employees' free and uncoerced election choice in any material way. I limited the Employer to evidence of unionrelated interactions between supervisory charge/relief charge nurses and nonsupervisory unit employees. In its post-hearing brief, the Employer contends that full inquiry into communications between supervisory charge/relief charge nurses and union representatives should have been received, as it could have led to evidence of direct union solicitation by supervisory charge/relief charge nurses and that preclusion of such evidence abridged the Employer's due process rights. An objections hearing is not a discovery tool. Otherwise irrelevant evidence is not permissible simply because it might ultimately lead to relevant evidence.

During the election period, but prior to the March 5 stipulation, the following charge/relief charge nurses, later stipulated to be supervisors, engaged in the following actions in support of the Petitioner's organizational drive:

- <u>Dolly Casas:</u> Casas worked nights as a charge nurse in the Employer's Intensive Care Unit (ICU). Although Casas attended some union meetings prior to March 5, she did not sign an authorization card, and she did not talk to unit employees about the Union.
- <u>Liezle Castro:</u> Serrette met with Castro at Denny's. On January 29, Castro signed an authorization card. Magsino told Castro to let employees know that union authorization cards could be signed at the Hampton Inn. Whether she did so is unknown.
- Rhoda de Leon: De Leon talked to Magsino about the Union twice, once at Denny's with Serrette present and once at a nursing station when another employee was present. On the latter occasion, Magsino asked de Leon how the nurses upstairs were "holding," a reference to continued union support, and if they had questions about the Union. De Leon said they were fine. De Leon brought some nonsupervisory coworkers with her to a union meeting at the Hampton Inn on January 22.
- John Del Valle: During the election period, Del Valle worked as a night shift charge nurse. Del Valle told unit employees he did not feel the need for a union. However, after Magsino told Del Valle that union authorization cards could be signed at the Hampton Inn, Del Valle signed a card on January 28. He neither noticed any unit employees present at the time he signed nor informed any that he had done so.

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- <u>Lucia Susie Eiley:</u> Eiley, a relief charge nurse in the ER during the 2010 election period, had been eligible to vote in the 2008 election. At some point during the 2010 election period, Magsino asked Eiley to meet with Serrette to learn about the Union. Eiley met with Serrette at Denny's Restaurant along with three unit employees, including Magsino. Serrette talked to them about the benefits of unionization. Later, Serrette asked Eiley to have other employees meet him to hear what he had to say about the Union. Thereafter, when employees asked Eiley about the Union, she told them if they wanted to know anything they should ask Serrette. Eiley did not recall ever telling an employee that he/she should go and hear what Serrette had to say about the Union.
  - On January 12, Eiley attended a union meeting at a unit employee's home along with seven or eight unit employees. Eiley also attended two union meetings held at the Hampton Inn where unit employees were also present. At the first meeting, Serrette talked to the assembled employees about the Union. At the second meeting Eiley signed an authorization in the presence of six unit employees. Later Eily told one to three employees she had signed a card.
- Cheryl Gilliatt: Gilliatt was a relief charge nurse during the 2010 election period until March 15 when she was promoted to a managerial position. When Gilliatt was a relief charge nurse, Magsino asked her to meet with Serrette, which she did at the end of January or the first of February. The subject of the Union was commonly discussed among unit employees, and Gilliatt spoke favorably of the Union with unit employees more than six times. On one occasion, after an employee complained about employment changes and recent cuts, Gilliatt said, "Yeah, we need the Union; I support the Union." Gilliatt told employees they, collectively, needed to find out more facts and learn all they could. Gilliatt, along with unit employees, discussed the union meetings generally and asked who planned to attend. Gilliatt signed an authorization card on January 27 in the presence of unit employees. Gilliatt told about ten unit employees that everyone needed to go to sign union authorization cards during the signing week, saying,

variously, such things as, "Are you going to go and sign cards? Are you going to go to the hotel? You need to attend after work today. When is your schedule? You only have until Sunday. Have you signed a card? When are you planning on going? You need to go and sign the card. Serrette said he wanted 100%."8

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Gilliatt attended a union meeting at the Hampton Inn at which about eight unit employees were present. After Serrette talked to employees about what the Union could do, he directed Gilliatt and Angelica Silva to talk to the Union's attorney. After the attorney questioned Gilliatt and Silva about their work duties, Gilliatt signed a union authorization card. Serrette gave Gilliatt a list of employees and asked if she could get them to attend the union meetings.

After her March 15 promotion Gilliatt began attending management meetings and changed her mind about supporting the Union. Thereafter, Gilliatt told 20-30 unit employees including Magsino that she no longer supported the Union because she had learned the Union had made promises she did not believe they could keep; Gilliatt encouraged employees to vote against the Union. During the week of the election, Gilliatt personally signed more than 100 copies of the Vote-No letter for distribution to all unit employees by department heads.<sup>9</sup> Gilliatt personally handed the Vote-No letter to six ER employees, including Magsino.

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<u>Xiuying Huang:</u> At some point during the 2010 election period, Huang met with Serrette at Denny's.

<u>Teresa Hower:</u> During the 2010 election period, Hower told a unit employee that the Union was coming back and that some nurses were trying to organize the Union again.

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<u>Samantha Jones:</u> During the 2010 election period, Jones worked as an ER charge nurse. Jones met with Serrette, probably at Denny's when no other employees were present, following which she signed an authorization card. After management told Jones and other charge/relief charge nurses they were not eligible to vote, she did not talk about the Union.

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<u>Angelica Silva:</u> During the 2010 election period Silva worked as a relief charge nurse in the Telemetry Department until her mid-March promotion to Director of Med-Surg in the same department. Prior to her promotion, Silva attended four union meetings where unit employees were also present. Silva signed an authorization card on January 27 during a union meeting where approximately eight unit employees were also present.

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Before her promotion, Silva talked with unit employees, including Magsino with whom she also text-messaged, about the Union and the meetings she had attended. Silva told unit employees she thought unionization was a good thing and that the Union had done a lot for her father in connection with medical benefits for both him and herself. She notified six unit employees of upcoming union meetings by forwarding to them text messages she had received about meeting dates and addresses. Between January 30 and February 6, the following text exchange, in pertinent part, occurred between Silva and Magsino:

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<sup>&</sup>lt;sup>8</sup> Although no specific evidence exists as to when Gilliatt urged employees to sign authorization cards, it is reasonable to assume that it occurred before the petition was signed on February 22.

<sup>&</sup>lt;sup>9</sup> The Employer stipulated that steps were taken to distribute the vote-no letter to all eligible voters.

Silva to Magsino: "Can you guys give us a list of who we're missing?"

Magsino to Silva: Magsino furnished a number of unit employee names and the names of charge nurses, Xiuying Huang and Cynthia Gabot, stating that the named individuals had "not signed up yet."

Silva to Magsino: "They work max two times a month, if that." After some text about the work schedules of unit employees, Silva stated, "I am for sure they will not let the charge nurses vote."

Magsino to Silva: "Who are the per diem firms that work less than one day a week?" Silva to Magsino: Silva gave the names of two unit employees.

Magsino to Silva: "Thanks. I'm trying to trim down the total number of people so we can make the 70% quota."

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Silva to Magsino: "Ronnie is on board."

Sometime before the election, Silva informed about four unit employees, two in Telemetry Med-Surg, that she had changed her favorable opinion about the Union. She told them that after doing research and looking at both sides, she realized the Union could not answer all their problems and that any change would not be overnight. Silva signed the Vote-No letter that was distributed to unit employees, hand delivering letters to a number of nonsupervisory employees.<sup>10</sup>

<u>Laurel Smith:</u> During the 2010 election period, Smith met with Serrette at Denny's. She signed an authorization card on January 30.

25 <u>Dulce Suzon:</u> Suzon agreed to be a union committee leader on January 18 and signed an authorization card on January 25.

Bienvenido Trinidad III: Trinidad worked during the critical period as a relief Charge Nurse in the Medical/Surgical Unit. Trinidad met with Serette at Denny's Restaurant along with about five of his unit's night shift employees. During a discussion of the Union, the group selected Trinidad and a nonsupervisory unit employee to help the Union as "point persons" to talk to nurses on the Medical/Surgical Unit's night shift. Trinidad attended two union meetings at the Hampton Inn along with the same group of employees. At the first meeting, Trinidad signed an authorization card, as did other unit employees in the group. At the next meeting, Trinidad met with the Union's attorney who questioned him about his work responsibilities. Because Trinidad was busy with personal matters he did not function as the Union's point person, but he did talk with coworkers about the Union and informed coworkers of the dates and times the Union was holding meetings at the Hampton Inn where authorization cards could be signed.<sup>11</sup>

The critical period during which the Board generally considers objectionable representation-election conduct (the critical period) "commences at the filing of the representation petition and extends through the election." *E.C. Electric, Inc.*, 344 NLRB 1200,

<sup>&</sup>lt;sup>10</sup> Silva was vague about the number of employees to whom she gave Vote-No letters, saying, "[W]e just got the stack of letters...and we gave them out to certain employees. I do not remember exactly how many I handed out..." Silva agreed that she had been instructed to hand out the Vote-No letter to every employee on duty.

<sup>&</sup>lt;sup>11</sup> In its post hearing brief, the Employer asserts that charge nurse Sharon Lamoine also spoke favorably to employees of the Union. However, Sharon Lamoine's employment with the hospital appears to have ended in early January, and her name does not appear on the 2010 Supervisory Status Stipulation. Therefore, I have not considered her alleged conduct.

FN 6 (2005). In representation proceedings where, as here, there has been no unfair labor practice allegation or finding, a party seeking to have a Board-supervised election set aside because of misconduct during the critical period carries a heavy burden of proof. The Board looks to all of the facts and circumstances to determine whether the election atmosphere was so tainted as to warrant such action. The objecting party must show the conduct in question had a reasonable tendency to interfere with the employees' free and uncoerced choice in the election to such an extent that it materially affected the results of the election. *Madison Square Garden Ct., LLC,* 350 NLRB 117, 119 (2007) (internal quotations and citations omitted); *Quest International,* 338 NLRB 856, 857 (2003).

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In determining whether the conduct has the tendency to interfere with the employees' freedom of choice, the Board considers nine factors: (1) The number of incidents; (2) the severity of the incidents and whether they were likely to cause fear among the employees in the bargaining unit (3) the number of employees in the bargaining unit subjected to the misconduct; (4) the proximity of the misconduct to the election; (5) the degree to which the misconduct persists in the minds of the bargaining unit employees; (6) the extent of dissemination of the misconduct among the bargaining unit employees; (7) the effect, if any, of misconduct by the opposing party to cancel out the effects of the original misconduct; (8) the closeness of the final vote; and (9) the degree to which the misconduct can be attributed to the party. See Cedars-Sinai Medical Center, 342 NLRB 596, 597 (2004), citing Taylor Wharton Division Hrasco Corporation, 336 NLRB 157, 158 (2001), et al.; Avis Rent-a-Car, 280 NLRB 580, 581 (1986).

Prounion supervisory conduct during the critical period of a representation election may be grounds for setting aside an election if the conduct could reasonably induce employees to support the union because they perceive potential supervisory retaliation or preferential treatment. *Harborside Healthcare, Inc.,* 343 NLRB 906, 907 (2004).<sup>12</sup> In determining whether supervisory prounion conduct breaches the requisite laboratory conditions of a fair election, the Board looks to the following two factors:

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(1) Whether the supervisor's prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. This inquiry includes: (a) consideration of the nature and degree of supervisory authority possessed by those who engage in the prounion conduct; and (b) an examination of the nature, extent, and context of the conduct in question.

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(2) Whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election, based on factors such as (a) the margin of victory in the election; (b) whether the conduct at issue was widespread or isolated; (c) the timing of the conduct; (d) the extent to which the conduct became known; and (e) the lingering effect of the conduct.<sup>13</sup>

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<sup>&</sup>lt;sup>12</sup> Knowing that supervisory authority may include the power to promote, reward, discipline, assign or direct, the Board recognizes the potential for abuse of such authority. "Whenever a supervisor engages in prounion or antiunion activities directed at [supervised] employees, the potential exists for these activities to put pressure on employees, who are unlikely to forget the power the supervisor has over their work life." *Id* at 906-907.

<sup>&</sup>lt;sup>13</sup> *Id* at 908.

The burden is on the objecting party to establish that objectionable acts occurred, which interfered with employees' exercise of free choice so as to materially affected the results of the election. *Id* at 910, citing *Wright Memorial Hospital v. NLRB*, 771 F.2d 400, 404 (8th Cir. 1985) enfg 271 NLRB No. 21 (1984) (not reported in Board volumes).

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The Employer presented evidence that stipulated supervisors during the critical period variously engaged in the following prounion conduct: expressed prounion sympathy and approval to nonsupervisory employees, suggested to nonsupervisory employees that they meet with a union representative to learn about the Union, told nonsupervisory employees of the locations, dates, and times when they could sign union authorization cards, joined with nonsupervisory employees in union-conducted meetings where prounion propaganda was dispensed, and signed union authorization cards in the presence of nonsupervisory employees.

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Silva and Gilliatt were the most active supervisory union-proponents. Silva attended multiple union meetings and told a number of nonsupervisory employees of her family's positive union experiences. Gilliatt, in addition to expressing prounion sentiments to unit employees, urged about ten such employees to sign authorization cards, saying the Union wanted 100% participation.

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Citing, inter alia, *Harborside*, supra, and *Flint Motor Inn Co.*,194 NLRB 733, 734 (1971), the Employer argues that the supervisory pro-union conduct herein warrants setting aside the election because the conduct reasonably tended to have a coercive effect and/or was likely to impair employees' free choice. In addressing the Employer's argument, a distinction must be made between prounion supervisory speech that neither called for nor required unit employees to take any prounion action (unassertive prounion conduct) and supervisory speech that could reasonably be expected to compel employee prounion activity.

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As to the unassertive prounion conduct herein, I apply the *Harborside* test. Under the first prong of the *Harborside* test, it must be determined whether the unassertive prounion conduct reasonably tended to coerce or interfere with the employees' exercise of free choice in the election. Inquiry into this first element focuses on two factors, (1) the nature and degree of supervisory authority possessed by those who engage in the prounion conduct, i.e., the stipulated-supervisory charge/relief charge nurses and (2) the nature, extent, and context of the conduct in question. No specific evidence was adduced regarding the first factor, but the parties stipulated in the election proceedings that certain charge/relief charge nurses were supervisors within the meaning of Section 2(11) of the Act. I accept that the stipulated-supervisory charge/relief charge nurses exercised meaningful authority over unit employees.

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Turning next to the nature, extent, and context of the unassertive prounion conduct, I note that supervisory prounion speech and activity, without more, is not objectionable. The Board instructs that "just as an employer, through its supervisors, can speak against representation (see Section 8(c)), a supervisor can also speak in favor of the union." *Harborside* at 911.<sup>14</sup> The supervisory expressions of prounion sentiments evidenced herein, including the passive signing of authorization cards, did not tend to coerce or interfere with the employees'

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<sup>&</sup>lt;sup>14</sup> Harborside also suggests that supervisory invitations to union meetings are not, without more, impermissible: "[The supervisor] went beyond merely inviting [a nonsupervisory employee] to union meetings." *Harborside*, at 912.

exercise of free choice in the election.<sup>15</sup> The unassertive prounion conduct herein differed pronouncedly from the objectionable conduct of the *Harborside* and *Flint* supervisors. The *Harborside* supervisor, often in a harassing, pressuring, and badgering manner, repeatedly threatened employees with the prospect of job loss if the union lost the election, solicited employees' signatures on authorization cards and a prounion petition, required an employee to attend union meetings, required another employee to wear a union pin, and repeatedly asked employees if she could "count on" them. The *Flint* supervisor solicited authorization cards, served as the union's "contact man," and outspokenly advocated union representation throughout the organizational campaign including the day of the election. Using the *Harborside* and *Flint* supervisory actions as paradigms for objectionable conduct, the unassertive prounion conduct of the stipulated-supervisory charge/relief charge nurses cannot reasonably be viewed as either threatening or intimidating.<sup>16</sup>

The Employer argues that stipulated supervisors herein went beyond passive prounion conduct and solicited authorization cards on behalf of the Union, which conduct the Board finds inherently coercive. *Madison Square Garden CT, LLC*, at 123; *Harborside* at 911. The evidence, however, does not show that any supervisor, save Gilliatt, did anything more significant than attend union meetings where unit employees were also present, speak favorably of the Union to unit employees, pass along to unit employees Union-meeting and card-signing logistical information and/or sign authorization cards in the presence of employees. In light of the Board authority cited above, I cannot find that any of that conduct constituted inherently coercive card solicitation. Accordingly, I find that the unassertive prounion conduct did not reasonably tend to coerce or interfere with the unit employees' exercise of free choice in the election.

Even assuming the unassertive prounion conduct was objectionable, it did not materially affect the outcome of the election. Even assuming the supervisors' prounion conduct was known to the number of employees sufficient to upset the Union's 33-vote margin of victory, nonsupervisory employees could not reasonably have attributed the prounion supervisory sentiments to the Employer in the face of the vigorous antiunion campaign the Employer waged throughout the election period. Further, there is no evidence the supervisors engaged in any prounion conduct after the parties reached stipulation on March 5, leaving supervisory-prounion silence in the several weeks before the election. Finally, during the weeks before the election, the most active supervisory union proponents, Silva and Gilliatt, orally recanted their prounion stances to some unit employees. In the week before the election, the two supervisors also signed the Employer's Vote-No letter to all unit employees and therein urged unit employees to vote no in the election. By these actions Silva and Gilliatt made known their personal opposition to the Union. Silva and Gilliatt's widespread retraction of their former prounion stances must

<sup>&</sup>lt;sup>15</sup> See *Northeast Iowa Telephone Co.*, 346 NLRB 465, 466-467 (2006) (although managers attended union meetings held at employees' homes, signed authorization cards while other employees were present, and told employees the union would help protect against layoffs, their conduct did not reasonably tend to coerce or to interfere with employee free choice.

<sup>&</sup>lt;sup>16</sup> While the Board does not require evidence of express threats or promises, supervisory prounion conduct must be at least implicitly coercive. See *Harborside* at 909, citing with approval *NLRB v. Hawaiian Flour Mill*, 792 F.2d 1459, 1462 (9<sup>th</sup> Cir. 1986) ("Evidence of actual threats are not required; implied threats of retaliation are sufficient.")

have significantly lessened if not eradicated any supervisory pressure employees might reasonably have earlier felt. Accordingly the unassertive prounion conduct did not breach the laboratory conditions of the election.

Some of Gilliatt's actions, however, went beyond unassertive prounion conduct and require separate consideration. In addition to expressing pro-union sentiments and/or providing prounion information, Gilliatt also urged unit employees to sign authorization cards. No evidence was adduced that Gilliatt furnished nonsupervisory employees with authorization cards, watched them sign cards, retrieved signed cards, or was informed as to which employees had signed cards. Nevertheless, for purposes of this analysis, I will consider that Gilliatt's conduct in urging employees to meet with the Union for the purpose of signing authorization cards constituted solicitation. Gilliatt's conduct in urging unit employees to sign authorization cards was, therefore, inherently coercive and satisfies the first prong of the *Harborside* test.<sup>17</sup> It remains to ascertain whether Gilliatt's conduct meets the second prong of the test, i.e. whether the conduct interfered with freedom of choice to the extent that it materially affected the outcome of the election.<sup>18</sup>

About two weeks before the election, upon promotion to management, Gilliatt's union sentiments changed dramatically. In a complete *volte face*, she personally informed a number of nonsupervisory employees that she no longer supported the Union. In the week of the election, she signed more than 100 copies of the Vote-No letter, some of which she hand-delivered to unit employees under her supervision, the rest of which were distributed to most if not all employees. Gilliatt's coercive conduct occurred almost six weeks before the election and was not significantly widespread, affecting only about ten employees. In the weeks just prior to the election, Gilliatt unambiguously repudiated her prounion opinions and encouraged employees to vote against the union. In these circumstances, I cannot find that Gilliatt's conduct in soliciting employees to sign union authorization cards had a lingering coercive effect or that, in light of her broad repudiation, it materially affected the outcome of the election.

Having found no prounion supervisory conduct that materially affected the outcome of the election, I recommend the Employer's objections 1-16, 20-21, and 29 be overruled.

#### 2. Objections 26 and 27

26. The Union, by its representatives, agents and supporters, manipulated photos of employees in order to misrepresent that those employees supported the Union.

27. The Union, by its representatives. agents and supporters, utilized photographs of employees in the Union's election campaign without authorization from those employees.

Objections 26 and 27 involve essentially the same facts and legal theory; they are considered together.

Toward the end of the election period, the Petitioner prepared the photo Vote-Yes brochure, a handout printed on glossy card-stock depicting the photographs of about 50 unit employees, mostly in individual poses, holding large white placards at torso level reading, "I'M VOTING YES!" (the photo brochure). The photographs were ranged around the centered-words "WE'VE ALREAD WON!" A poster-size version of the photo brochure was placed in the ER

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<sup>&</sup>lt;sup>17</sup> See Madison Square Garden CT, LLC, at 123; Harborside at 911

<sup>&</sup>lt;sup>18</sup> Harborside at 908.

break room for at least a brief period of time. During the week of the election, the Petitioner mailed smaller photo Vote-Yes brochures to all employee names appearing on the Excelsior List and also handed them out at the hospital.

In preparing the photo Vote-Yes brochure, representatives of the Petitioner photographed various unit employees who came to the Petitioner's election quarters at the Hampton Inn. About five employees declined to have their photographs taken, and two others were photographed but later asked that their photographs not be used, which requests were honored.

In its post-hearing brief, the Employer asserts that "aside from the Union's self-serving testimony that a rehearsed speech was communicated to RNs during the photo sessions, there is no evidence that all of the RNs in the flier understood what message would be communicated on the blank sign that they were holding at the time their pictures were taken or that all of the RNs in the flier provided the Union with consent to use their likeness in pro-union campaign materials." However, the burden of proof herein does not require the Petitioner to prove that photographed unit employees understood the purpose of the photographs or consented to their publication in the photo Vote-Yes brochure. Rather, as stated above, the applicable burden of proof is on the Employer, as the objecting party, to show that photographed employees did not understand and/or consent to participate in the brochure and that their lack of understanding and consent had a reasonable tendency to interfere with employees' uncoerced election choices.

James Johnson (Johnson) was the only photographed employee to testify that the Union misled him about his photograph's purpose and eventual use. When Johnson was photographed, union representatives, Olivia Quijano (Quijano) and Thor Causing were the only other persons present. According to Johnson, the following occurred: Johnson told the two representatives he was very particular about how his photograph was displayed. They assured him the purpose of taking his photograph was purely a legal procedure in case the hospital administration should retaliate against him for speaking to the Union. Johnson questioned why he was asked to hold a blank placard. He could not recall the representatives' response but said, "They basically played it off and assured me...that my picture would not be postered or distributed in any way, shape, or form." Thereafter, Johnson's photograph appeared in the photo Vote-Yes brochure.

Quijano testified that during Johnson's photo session she showed him a pamphlet with individual and group photographs of union-affiliated employees of other hospitals, each of which featured an employee(s) holding a large white placard bearing, variously, the words "VOTE YES!" or "WE'RE WITH YOU" (the support pamphlet). Quijano told Johnson, in pertinent part, "Thor and I will be taking your [photograph] because we're going to be creating a flyer similar to [the support pamphlet] that we will be circulating two to three days before the election. They will be circulated by the leaders, so you'll get a copy. And similarly to the [support pamphlet] you will be holding signs that say, 'I'm voting yes.' The reason we do this is because we want to show management that we are past the election. We're obviously going to win this and that we want to get the focus away from the anti-union campaign to negotiating because that's what we should be fighting about." She explained that Johnson would hold a blank white placard for the photograph, the wording for which would be later inserted for better script legibility. According to Quijano, Johnson made no objection.

After careful consideration of Johnson and Quijano's testimony, I accept the account of Quijano, whom I found to be a candid and reliable witness. When pressed in cross-examination to report exactly what she had told Johnson, she testified with remarkable recall and clarity. I

find, therefore, that Quijano explained to Johnson the union strategy behind the employee photographs and told him the resulting brochure would be distributed to employees. In these circumstances, the use of Johnson's photograph does not constitute objectionable behavior. See *Gormac Custom, Mfg.*, 335 NLRB 1192 (2001). As there is no credible evidence the Union utilized any unauthorized photographs in the photo brochure, I recommend the Employer's objections 26 and 27 be overruled.

#### 3. Objection 28

28. By the conduct referenced above and other conduct, the Union, its representatives, agents and supporters, engaged in conduct interfering with the election or in conduct affecting the results of the election.

Objection 28 is a catch-all objection for which no evidence apart from that set forth above has been produced. Accordingly, I recommend that Objection 28 be overruled.

#### CONCLUSION

Based on the above facts and for the above reasons, I recommend the Employer's objections, in their entirety, be overruled and that this matter be remanded to the Regional Director for appropriate action.<sup>19</sup>

Dated: Washington, D.C. July 7, 2010

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Lana H. Parke Administrative Law Judge

Ana V. Sack

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Pursuant to the provisions of Section 102.69 of the Board's Rules and Regulations, Series
 8, as amended, within 14 days from the date of issuance of this Recommended Decision, either party may file with the Board in Washington D.C. an original and eight copies of exceptions thereto. Exceptions must be received by the Board in Washington by July 21, 2010. Immediately upon the filing of such exceptions, the party filing same shall serve a copy thereof upon the other parties and shall file a copy with the Regional Director. If no exceptions are filed thereto, the Board may adopt this Recommended Decision.